Panel Decision for dispute CAC-ADREU-001889

Case number	**CAC-ADREU-001889**
Time of filing	**2006-06-22 11:28:26**
Domain names	**moll.eu**

Case administrator

Name	**Eva Zahořová**

Complainant

Organization / Name	**Moll System- und Funktionsmoebel GmbH**

Respondent

Organization / Name	**EURid**

INSERT INFORMATION ABOUT OTHER LEGAL PROCEEDINGS THE PANEL IS AWARE OF WHICH ARE PENDING OR DECIDED AND WHICH RELATE TO THE DISPUTED DOMAIN NAME

None.

FACTUAL BACKGROUND

The Complainant is a German company that manufactures office furniture. It filed an application for the domain name <moll.eu> (the "Disputed Domain Name") on 7 December 2005. The application was first in the queue and the documentary evidence was received by EURid on 21 December 2006, before the deadline of 16 January 2006. However, the Complainant's application was rejected by the Respondent.

The Complainant filed a Complaint against the decision of the Respondent on 22 June 2006. In its Complaint it requested that the Czech Arbitration Court require the Respondent to disclose the documentary evidence provided by or on behalf of the Complainant at the time of its application for the Disputed Domain Name. On 22 June 2006 the Court duly requested that the documentary evidence be disclosed by the Respondent, and the Respondent provided this on 30 June 2006.

The formal date of the commencement of the ADR Proceeding was 30 June 2006. The Respondent had 30 working days from the notification of the Complaint to file a Response, and did so on 21 August 2006.

The panel was appointed to decide the case on 28 August 2006.

A. COMPLAINANT

The Complainant contends that the documentary evidence was submitted on 16 January 2006 and consisted of an extract from an online database operated by the German Patent and Trademark Office of the German registered trade mark MOLL (Number 30462496.9). It therefore alleges that EURid's decision to reject its application for the Disputed Domain Name conflicts with Regulation (EC) Number 874/2004 (the "Regulation"), which provides in Article 10(1) that the holders of prior rights established by national and/or Community Law shall be eligible to apply to register domain names during a period of phased registration. Prior rights shall be understood to include registered national trademarks.

Furthermore, the Complainant states that, according to Section 13.2(ii) of the Sunrise Rules, it is sufficient to submit an extract of an official online database operated and managed by the relevant national trade mark Office in order to prove that a trade mark is registered. The extract submitted by the Complainant demonstrates that it is the holder of the registered German trademark MOLL (Number 30462496.9), registered on 1 December 2004. According to the Complainant, Section 13.2(ii) of the Sunrise Rules has therefore been met.

The Complainant points out that although it indicated "registered community trademark or internationally registered trademark – Germany" on the cover sheet sent to the validation agent, PricewaterhouseCoopers, the validation agent should easily have recognized that the application was well founded based on the registered German trademark MOLL (Number 30462496.9), rather than on a community or international trade mark. The Complainant contends that its mistake on the cover sheet was therefore not sufficient to reject the application. Section 21.3 of the Sunrise Rules provides that the validation agent is not obliged, but is permitted in its sole discretion, to conduct its own investigations into the circumstances of the prior right claimed and the documentary evidence produced. Nevertheless the Complainant contends that it is a fundamental principal of justice that the validation agent should not be exempted from the requirement to act reasonably. In the Complainant's opinion, the validation agent could have easily cleared up any doubts concerning the prior right invoked and the documentary evidence provided.

The Complainant points out that it is also holds the German trade marks MOLL, Numbers 1084368 and 884696, as well as the international registration MOLL, Number 498912. Each of these trade marks would also allow the attribution of the Disputed Domain Name to the Complainant according to Article 10(1) of the Regulation.

Finally, according to Section 19.2 of the Sunrise Rules, a prior right claimed to a name including figurative or composite signs will only be accepted if the sign exclusively contains the name or if the word element is predominant and can be clearly separated or distinguished from the device element, provided that all alphanumeric characters included in the sign are contained in the domain name applied for and the general impression of the word is apparent. The Complainant asserts that, as far as the registered German trademark MOLL (Number 30462496.9) is concerned, the word element is predominant and can be clearly distinguished from the device element as this only consists of a geometrical shape without significant distinctiveness. According to the Complainant, Section 19.2 of the Sunrise rules has therefore been fulfilled and cannot be invoked as grounds for rejection of the Complainant’s application for the Disputed Domain name.

The Complainant also points out that the Complainant’s company name was changed to
moll Systemmöbel GmbH on 26 January 2006. The Complainant therefore requests that the Respondent’s decision not to attribute the Dispute Domain Name be annulled and that the Disputed Domain Name be attributed to the Complainant (under its new company name).

B. RESPONDENT

The Respondent points out that Article 10(2) of the Regulation states that registration on the basis of a prior right shall consist of the registration of the complete name for which the prior right exists, as written in the documentation which proves that such a right exists.

The Complainant submitted documentary evidence consisting of German trade mark registrations for SCOOTER, BOOSTER, RUNNER, CHAMPION, WINNER, MAXIMO, MAXIMO FORTE, PRO, VARENCE, TYRO, CHORUS, OVATO, BASIC and SCIENCE. The Complainant also submitted international trade mark registrations for RUNNER, CHAMPION, WINNER, MAXIMO FORTE, VARENCE, TYRO, CHORUS, OVATO and BASIC. None of the submitted trade mark registrations corresponded to the term MOLL. The validation agent therefore concluded that the Complainant's documentary evidence did not demonstrate that the Complainant was the holder of a prior right in relation to the term MOLL. The Respondent therefore rejected the Complainant's application.

The Respondent contends that, according to Article 14 of the Regulation, it is the applicant's responsibility to submit documentary evidence showing that he or she is the holder of the prior right claimed on the name in question. Article 14 of the Regulation specifies that the applicant has a period of 40 days from the submission of the application to submit this documentary evidence. This is confirmed by Section 8.5 of the Sunrise Rules, which states that:

"Documentary Evidence must be received by the Processing Agent within forty (40) calendar days following receipt of the Application by the Registry, failing which the Application will be considered to have expired."

The validation agent may therefore only take into account documentary evidence submitted within the 40 day period, which, in this case, expired on 16 January 2006.
According to the Respondent, the Complainant's first set of documentary evidence was received on 21 December 2005 by the validation agent, although the Complainant makes no mention of this. Although the documentary evidence was submitted in line with the formal requirements, it did not contain any evidence of prior rights in the term MOLL. The Respondent therefore had no other option but to reject the Complainant's application for the Disputed Domain Name.

The Complainant states that it submitted documentary evidence on 16 January 2006 (the deadline for the submission of documentary evidence in this case) consisting of an extract of the official online database of the German Patent and Trademark Office in relation to the German registered trademark MOLL (Number 30462496.9). However, the Respondent states that the second set of documentary

evidence cannot be taken into account for the following reasons:

(i) The Respondent has no record of ever having received such second set of documentary evidence. Moreover, the Respondent contends that, from a cursory examination of the allegedly submitted second set of documentary evidence, it can be severely doubted that it was indeed submitted to the Respondent. As proof that the documentary evidence was submitted on 16 January 2006, the Complainant annexed five exhibits to its Complaint. These five exhibits were allegedly submitted to the validation agent on 16 January 2006. However, the printout of the exhibits clearly and specifically mentions that the trade mark registrations were requested from the online trade mark register on 16 June 2006. The Respondent therefore does not see how these documents, which were only requested on 16 June 2006, could have been submitted on 16 January 2006.

(ii) The Respondent makes reference to Section 8.6(i) of the Sunrise Rules, which states that "each Application must be supported by one (1) set of Documentary Evidence". Similarly, Section 21.2 of the Sunrise Rules states that "the Validation Agent examines whether the Applicant has a Prior Right to the name exclusively on the basis of a prima facie review of the first set of Documentary Evidence received and scanned by the Processing Agent […])". As the documentary evidence that was allegedly submitted on 16 January 2006 was not part of the first set of documentary evidence received on 21 December 2005, the Respondent states that it could not base its decision on any additional documents.

(iii) Furthermore, Section 8.3 of the Sunrise Rules states that: "Documentary Evidence submitted without a Cover Letter or with a modified Cover Letter or a Cover Letter that is not duly signed will be rejected, with the exception of Documentary Evidence submitted electronically by the Registrar (in which case no Cover Letter needs to be submitted to the Processing Agent)". The Respondent points out that the first set of documentary evidence received by the Respondent on 21 December 2005 was annexed to a cover letter, in conformity with the Sunrise Rules. Conversely, the Complainant does not provide any proof that the allegedly submitted second set of documentary evidence was annexed to a cover letter. In any case the exhibits annexed to the Complainant's Complaint do not include any such cover letter.

(iv) Finally, Article 14 of the Regulation provides that the critical date is not the date on which the documents are submitted, but the date on which they are received: "in such a way that it shall be received by the validation agent within forty days from the submission of the application for the domain name". The Respondent points out that the Complainant does not provide any proof that the allegedly submitted second set of documentary evidence was received by the respondent on or before 16 January 2006. In the Respondent’s opinion, receipt on or before the relevant date is highly doubtful as the Complainant refers in its Complaint to the submission (not the receipt) of the second set of documentary evidence on 16 January 2006. In this respect, the Respondent also notes that the first set of documentary evidence was submitted on or around 12 December 2005 (i.e. the date mentioned on the cover letter), whereas it was only received by the validation agent on 21 December 2005.

The Respondent stresses that Article 22(1)(b) of the Regulation states that a decision taken by the Respondent may only be annulled when it conflicts with the Regulation.
According to the Respondent, verification of a conflict is the only task for the Panel in these proceedings, which may not in any case serve as a “second chance” or an additional round providing applicants with an option to remedy their imperfect original application that was rejected during the Sunrise Period (as demonstrated by Case Number 551 (VIVENDI) and Number 810 (AHOLD)). In other words, as decided in Case Number 1194 (INSURESUPERMARKET), "[t]he ADR procedure is not intended to correct domain name applicants’ mistakes".

The Respondent contends that only the documentary evidence which the Respondent was able to examine at the time that the application was validated should be considered by the Panel to assess the validity of the Respondent's decision (as demonstrated notably by Case Number 294 (COLT), Number 954 (GMP), Number 01549 (EPAGES) and Number 1674 (EBAGS)). Exhibits 1 to 5 of the Complainant setting out the Complainant’s trade mark rights were not part of the documentary evidence and therefore could not be taken into consideration by the Respondent at the time of its decision. According to the Respondent, any new information may not be taken into consideration to evaluate whether the Respondent's decision conflicts with the Regulation, which is the only purpose of the present ADR proceedings. As decided in Case Number 894 (BEEP): "If there would be exceptions in favour of the Applicant, allowing additional submissions of evidence after the forty day period, it would affect the legitimate expectancy of the next Applicant in the queue for the domain name in question and conflict with the first come first served principle set out in Article 14 of the Commission Regulation (EC) No 874/2004. Consequently, the license declaration submitted by the Complainant in this ADR proceeding cannot be admitted as evidence substantiating a Prior Right".

The Respondent concludes that the Regulation and the Sunrise Rules give all holders of prior rights the opportunity to demonstrate their prior rights during the phased registration period. In order to benefit from this opportunity, applicants must comply with the strict procedure laid out by the Regulation for dealing with the thousands of applications received during the phased registration period. These

strict procedures aim at making sure that applications are substantiated and that applicants are indeed eligible to apply for domain names at a time no later than the date on which applications are received.
The Complainant in the present case did not seize this opportunity, because its application did not correctly fulfil the substantial requirements. As the Panel in Case Number 219 (ISL) stated: "One could argue that sympathy is overruled by the applicable Regulations serving among other purposes the (cost-effective) functionality of the phased registration and the principles hereof".

For these reasons, the Respondent argues that the Complaint must be rejected.

DISCUSSION AND FINDINGS

Article 22(11) of the Regulation states that, in the case of a procedure against the Registry, as is the case here, the Panel must decide whether the Registry's decision conflicts with the Regulation or Regulation (EC) 733/2002 (collectively referred to as the "Regulations"). The Panel must therefore decide, from a purely objective standpoint, whether the Respondent's actions were in accordance with the Regulations. The Panel would also add that, whilst the Sunrise Rules are helpful in clarifying the meaning of the Regulations, and set down detailed procedures for applicants to follow, they are not particularly pertinent when deciding whether the Respondent's actions were in accordance with the Regulations.

The Complainant applied for the Disputed Domain Name on 7 December 2005, the first day of the Sunrise Period, and so was therefore required to demonstrate ownership of a valid prior right in accordance with Article 12(2) of the Regulation, namely a registered national or Community trade mark or a geographical indication (in view of the Complainant's status as a furniture manufacturer, the rules on public bodies are not relevant). In accordance with Article 10(2), only the complete name for which the prior right exists, as written in the documentation which proves that such a right exists, may be reflected in the corresponding domain name.

As evidenced by the Complainant’s documentary evidence (disclosed by the Respondent upon the Complainant’s request), the Complainant failed to provide any evidence of a right in the term MOLL. The Panel is therefore of the opinion that the Respondent correctly rejected the Complainant’s application. The Panel would also add that it has no reason to doubt the veracity of the documentary evidence disclosed by the Respondent. It notes that the Complainant does not deny the existence of such documentary evidence, but merely fails to make reference to it.

The Complainant only refers in its Complaint to documentary evidence submitted on 16 January 2006. The Respondent claims never to have received such documentary evidence, and also points out that, in accordance with Article 14 of the Regulation, the documents must have been received by the validation agent on 16 January 2006, rather than simply submitted. As the Complainant states that the documentary evidence was only submitted on 16 January 2006, it would seem unlikely that it was actually received on the same day. Article 14 of the Regulation states that if the documentation is not received by the relevant deadline, the application for the domain name must be rejected.

However, even if the Panel grants the Complainant the benefit of the doubt and accepts that the documentation to which the Complainant refers was actually received by the validation agent in due time, the Respondent would have been bound to ignore it. Article 14 of the Regulation sets out the procedure for validation, and clearly implies that only the first set of documentary evidence per application is to be considered by the validation agent. If the documentary evidence for an application (submitted within the relevant deadline) fails to prove the relevant prior right, the next application in the queue falls to be considered, and so on until a claim is found for which prior rights on the name in question are confirmed by the validation agent. It is clear from the wording of the Regulation that if the documentary evidence submitted fails to prove the prior right in question, the validation agent must proceed to consider the next application in the queue, rather than waiting until the forty day deadline expires, just in case the applicant decides to submit further documentary evidence. In other words, only the first set of documentary evidence submitted counts. To find otherwise would be somewhat nonsensical, given the clear wording of Article 14 of the Regulation.

In this regard the Panel would point out that, in view of the sheer scale of the launch of the .EU extension, from a practical point of view it was necessary to insist that applicants complied with the relevant procedures and time periods set down in the Regulation. In the Panel's view those applicants who failed to do so should have not have any recourse against EURid (in the event that EURid correctly applied the Regulations), and to find otherwise would render the system uncertain for all concerned. The documentary evidence submitted by the Complainant to the Respondent on 21 December 2005 did not correctly demonstrate the Complainant’s right to the Disputed Domain Name, and so the Respondent correctly rejected the Complainant’s application. The fact that the Complainant may later have submitted correct documentary evidence is not relevant, regardless of whether this was received during the forty day period or afterwards, in connection with an ADR Proceeding. If it were, the Complainant would have been granted a second “bite of the cherry”, which would be contrary to the system of fairness and certainty that the Regulation is intended to provide.

The Panel therefore concludes that the Respondent's decision to reject the Complainant's application for <moll.eu> does not conflict

with the Regulation. As the Respondent's decision is in accordance with the relevant texts, the Panel is therefore obliged to uphold it and deny the Complainant's request that the Disputed Domain Name be awarded to the Complainant.

DECISION

For all the foregoing reasons, in accordance with Paragraphs B12(b) and (c) of the Rules, the Panel orders that the Complaint be denied.

PANELISTS

Name	**David Taylor**

DATE OF PANEL DECISION 2006-09-21

Summary

ENGLISH SUMMARY OF THIS DECISION IS HEREBY ATTACHED AS ANNEX 1

The Complainant applied for the Disputed Domain Name on 7 December 2005, the first day of the Sunrise Period, and so was therefore required to demonstrate ownership of a valid prior right in accordance with Article 12(2) of the Regulation, namely a registered national or Community trade mark or a geographical indication (in view of the Complainant's status as a furniture manufacturer, the rules on public bodies were not relevant). Article 10(2) states that only the complete name for which the prior right exists, as written in the documentation which proves that such a right exists, may be reflected in the corresponding domain name.

As evidenced by the Complainant’s documentary evidence (disclosed by the Respondent upon the Complainant’s request), the Complainant failed to provide any evidence of a right in the term MOLL. The Panel was therefore of the opinion that the Respondent correctly rejected the Complainant’s application. The Panel added that it had no reason to doubt the veracity of the documentary evidence disclosed by the Respondent and noted that the Complainant did not deny the existence of such documentary evidence, but merely failed to make reference to it. Instead the Complainant only referred to documentary evidence submitted on 16 January 2006. However, the Panel found that even if the documentation to which the Complainant referred had actually been received by the validation agent in due time, the Respondent would have been bound to ignore it.

Article 14 of the Regulation sets out the procedure for validation, and clearly implies that only the first set of documentary evidence per application is to be considered by the validation agent. If the documentary evidence for an application (submitted within the relevant deadline) fails to prove the relevant prior right, the next application in the queue falls to be considered, and so on until a claim is found for which prior rights on the name in question are confirmed by the validation agent. The Panel found that it was clear from the wording of the Regulation that if the documentary evidence submitted failed to prove the prior right in question, the validation agent must proceed to consider the next application in the queue, rather than waiting until the forty day deadline expired, just in case the applicant decided to submit further documentary evidence. In other words, only the first set of documentary evidence submitted counted.

The Panel also pointed out that, in view of the sheer scale of the launch of the .EU extension, from a practical point of view it was necessary to insist that applicants complied with the relevant procedures and time periods set down in the Regulation. In the Panel's view those applicants who failed to do so should have not have any recourse against EURid (in the event that EURid correctly applied the Regulations), and to find otherwise would render the system uncertain for all concerned. The Complaint was therefore denied.